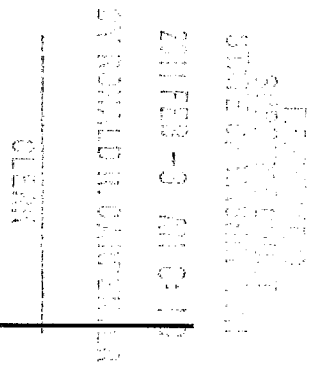
No. 84716-9

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

LESTER RAY JIM, Respondent.



SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES PRESENTED FOR REVIEW

1. Do off-reservation Indian Treaty Fishing Access Sites purchased and managed by the United States for the use of tribal members constitute "established Indian reservations" held in trust or restricted from alienation so as to preclude State criminal jurisdiction under RCW 37.12.010?

2. To the extent *State v. Sohappy,* 110 Wn.2d 907, 757 P.2d 509 (1988), holds that a tribal fishing site owned and managed by the United States for the use of multiple tribes constitutes an "established Indian reservation" for purposes of RCW 37.12.010, should the case be overruled?

II. STATEMENT OF THE CASE

The Maryhill Treaty Fishing Access Site ("TFAS") is located adjacent to the Columbia River within Klickitat County. On June 25, 2008, Mr. Jim, an enrolled member of the Yakama Nation, was conducting Indian treaty commercial fishing on the Columbia River. After Mr. Jim landed his boat at the Maryhill TFAS, he was approached by officers of the Washington Department of Fish and Wildlife ("WDFW"). The officers cited Mr. Jim for unlawful use of a net to take

fish in the second degree under RCW 77.15.580. Clerk's Papers (CP) 11.

The District Court of Klickitat County, Judge Brian Altman presiding, orally dismissed the citation on other grounds on October 21, 2008.[1] CP 10. On appeal to Superior Court, the State for the first time raised the issue of criminal jurisdiction under RCW 37.12.010. Relying on *State v. Cooper,* 130 Wn.2d 770, 928 P.2d 406 (1996), Judge E. Thompson Reynolds issued a memorandum opinion on April 1, 2009, reversing the District Court and remanding for further proceedings. CP 50-51.

Mr. Jim filed a motion for discretionary review with the Court of Appeals, which then reversed the Superior Court's order in a published opinion issued on May 11, 2010. *State v. Jim,* 156 Wn.App. 39, 230 P.3d 1080 (2010). The court held that the Maryhill TFAS is "an established Indian reservation" owned and controlled by the United States for the exclusive use of enrolled members of four Indian tribes, and that the exception to State criminal jurisdiction in RCW 37.12.010 therefore applies. This appeal followed, and the Court accepted review on November 3, 2010.

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[1] The issue of the location of the WDFW citation, and whether the Maryhill TFAS is "Indian country" for purposes of state jurisdiction, was never briefed in the trial court. Indeed, the State failed to file any brief at all in response to Mr. Jim's motion to dismiss on the grounds that the State failed to prove a conservation necessity for the citation.

III. ARGUMENT

A. THE COURT BELOW RULED CORRECTLY THAT THE MARYHILL TREATY FISHING ACCESS SITE IS EXEMPT FROM STATE CRIMINAL JURISDICTION BECAUSE IT IS AN "ESTABLISHED INDIAN RESERVATION" HELD IN TRUST BY THE UNITED STATES, AND ITS HOLDING DOES NOT CONFLICT WITH PRIOR CASE LAW INTERPRETING RCW 37.12.010.

Acknowledging the congressional legislation establishing the TFAS, and relying on this Court's decision in *State v. Sohappy,* 110 Wn.2d 907, 757 P.2d 509 (1988), the court below held that the Maryhill TFAS "is in Indian Country" and "is entitled to reservation status." *Jim,* 156 Wn.App. at 43. In reversing the decision of the superior court, the Court of Appeals concluded:

> While *State v. Sohappy* merits a narrow construction, we reason that court did not intend no other treaty site could ever be exempt from state criminal jurisdiction under our facts. Considering, that our case is distinguished from *Cooper* and is more like the state and federal *Sohappy* cases, we hold the State does not have jurisdiction to prosecute Mr. Jim for fishing violations at the MTFAS.

Id. The court then ruled that the superior court had erred in reversing the trial court's dismissal. *Id.*

In its Petition for Review the State nonetheless argues that the Maryhill TFAS is not an "established reservation" because it is outside the exterior boundaries of the Yakama Reservation. In addition, the State maintains that the court's decision below conflicts with its own holding in

State v. Boyd as well as this Court's decision in *State v. Cooper,* and should therefore be reversed. Finally, the State claims that a "jurisdictional gap" will result if the decision is affirmed. Each of these positions should be rejected by the Court for the following reasons.

1. **The Maryhill TFAS is an "established reservation" because it was set aside by Congress for the exclusive use of enrolled members of the Yakama Nation and three other tribes for the purpose of treaty fishing.**

On November 1, 1988, Congress enacted Title IV of Public Law 100-581. Pub. L. No. 100-581, § 401, 102 Stat. 2938, 2944 (1988). The act was "a vehicle for the United States to satisfy its commitment to the Indian tribes which exercise fishing rights on the Columbia River and whose traditional fishing places were inundated by flooding caused from the construction of the Bonneville Dam." S. Rep. No. 100-577, at 22 (1988), as reprinted in 1988 U.S.C.C.A.N. 3908, 3912. Title IV was substantially similar to a 1945 congressional act that had previously established Indian treaty fishing "in-lieu sites." Pub. L. No. 79-14, § 2, 59 Stat. 22. The 1988 statute authorized the U.S. Army Corps of Engineers to improve federally owned lands adjacent to the Columbia River "to provide access to usual and accustomed fishing areas and ancillary fishing facilities" for enrolled members of the Yakama Nation and three other tribes. Pub. L. No. 100-581, § 401(a), 102 Stat. at 2944. Like the

previous "in-lieu" legislation, Title IV authorized the Corps to improve and maintain the fishing sites and then transfer them to the Department of the Interior to be held for the benefit of the tribes. *Id.,* § 401(b)(2). These new sites became known as "Treaty Fishing Access Sites." Subsequent amendments to Title IV clarified the location of these sites, including the Maryhill TFAS. See Pub. L. No. 104-303, § 512, 110 Stat. 3762 (1996).

In 1997, the Bureau of Indian Affairs ("BIA") promulgated regulations regarding the TFAS, restricting their use to enrolled members of the four treaty tribes designated in the statute, including the Yakama Nation. 25 CFR § 247.2(b); 25 CFR § 247.3; 62 Fed. Reg. 50866 (Sept. 29, 1997). Under these regulations the TFAS are under the direct control of the Portland Area Director of the BIA (now the Northwest Area Director). 25 CFR § 247.2(c). The supplementary information to the final rule in the Federal Register states that "the Bureau agreed that the States do not have regulatory jurisdiction or authority over the in-lieu fishing sites." 62 Fed. Reg. 50866, 50867; *Jim,* 156 Wn.App at 43.

These facts regarding the congressional authority for TFAS were critical to the Court of Appeals decision because the statutory exception to State criminal jurisdiction over Indians within Indian country only applies

to an "established Indian reservation." RCW 37.12.010.[2] This Court has held that the State has criminal jurisdiction over all Indians on deeded fee lands within the boundaries of an Indian reservation. *Somday v. Rhay,* 67 Wn.2d 180, 184, 406 P.2d 931 (1965). However, State assumption of such jurisdiction does "not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States." RCW 37.12.010; *State v. Boyd,* 109 Wn.App. 244, 252, 34 P.3d 912 (2001), *review denied,* 146 Wn.2d 1012, 51 P.3d 86 (2002). Therefore, the question of whether the Maryhill TFAS comes under the exception to State jurisdiction hinges on whether it is an "established Indian reservation" according to the intent of the Legislature.

In its memorandum opinion, the court below acknowledged the status of the Maryhill Site and correctly followed *State v. Sohappy*, in which this Court held that a federally controlled Indian "in-lieu" treaty fishing site was an "established Indian reservation." *Jim,* 156 Wn.App. at 42. This conclusion was in turn based on the Ninth Circuit's decision in *United States v. Sohappy,* 770 F.2d 816 (9th Cir. 1985), *cert. denied,* 477

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[2] Washington enacted RCW 37.12.010 in 1963 pursuant to §§ 6 and 7 of Pub. L. No. 83-280 ("P.L. 280"). These provisions together have been interpreted as permitting states to assume "partial" criminal jurisdiction over Indian country within their borders as long as they do so in conformity with state laws and procedures. *Washington, et. al. v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 484-499, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

U.S. 906 (1986), which reasoned that the very same in-lieu site was "reservation land" subject to federal criminal jurisdiction because it was within "Indian country." *Id.* The court noted that although the site in *Sohappy* was established under an earlier federal statute, its purpose is exactly the same, and it has similar restrictions that exclude all individuals who are not enrolled members of four specified Indian tribes with treaty reserved fishing rights. *Id.* ("use of these sites is limited to tribal members"); *State v. Sohappy,* 110 Wn.2d at 908 (*"use of the sites is restricted to such Indians"* (italics in original)).

The primary flaw in the State's argument is that, by invoking the state statute, it has necessarily conceded that the TFAS is within Indian country. RCW 37.12.010; *Cooper,* 130 Wn.2d at 773 (statute assumed "criminal jurisdiction over all Indian country" within the State); see also *Yakima Indian Nation,* 439 U.S. at 472 (Congress under P.L. 280 authorized state criminal jurisdiction "in Indian country"). Because the term "Indian country" is defined by federal statute and case law, the State cannot logically maintain that the site is not an "Indian reservation." An amendment to the Major Crimes Act, enacted fifteen years before the state statute at issue, defines "Indian country" for purposes of federal criminal jurisdiction as:

a) all lands within the limits of *any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added); 62 Stat. 757 (1948), *as amended.* The Legislature is presumed to be familiar with judicial interpretations of statutes, including those enacted by Congress. *State v. Bobic,* 140 Wn.2d 250, 264, 996 P.2d 610 (2000). Under the federal case law the terms "Indian allotments" and "dependent Indian communities" were already judicially defined by 1963, and do not apply to the TFAS. See *Petition of Carmen,* 165 F.Supp. 942 (D.C.Cal. 1958), *aff'd,* 270 F.2d 809 (9th Cir. 1959), *cert. denied,* 361 U.S. 973 (1960) ("allotments"); *United States v. McGowan,* 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed 410 (1938) ("dependent Indian communities").

This conclusion is reinforced by the U.S. Supreme Court's definition of an "Indian reservation" as land that "had been validly set apart for the use of the Indians as such, under the superintendence of the

Government." *United States v. Pelican,* 232 U.S. 442, 449, 34 S.Ct. 396, 58 L.Ed. 676 (1914)). Federal decisions from almost a century ago were clear that the term embraces not only those aboriginal lands reserved by treaty or executive order, but also lands "set apart as an Indian reservation out of the public domain, and not previously occupied by Indians."[3] *Donnelly v. United States,* 228 U.S. 243, 268-269, 33 S.Ct. 449, 57 L.Ed. 820 (1913). Given the congressional creation of the TFAS as exclusive Indian treaty fishing areas on existing federal lands to replace those lost by inundation from Columbia River dams, the State cannot persuasively argue that they do not meet those criteria. As a result, they are "established Indian reservations" within the Legislature's understanding of what constitutes "Indian country."

2. The exception to criminal jurisdiction in RCW 37.12.010 should be construed broadly to include the TFAS, and the decision below is consistent with *State v. Cooper* because the tribe has not consented to State criminal jurisdiction.

The State contends that the exception to State jurisdiction must be construed narrowly, and that RCW 37.12.010 has three elements that must be satisfied before the exception can be applied. Petition for Review at 8. In addition to being "within an established Indian reservation," the *situs* of

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[3] In fact, one of the decisions relied upon by this Court in *State v. Sohappy* involved essentially the same type of congressionally authorized purchase of lands for exclusive Indian use. *United States v. John,* 437 U.S. 634, 644-646, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

the crime must be either on tribal or allotted lands, and such lands must be either held in trust by the United States or subject to a federal restriction on alienation. *Id.* However, as the court below pointed out, "statutes must be liberally construed in favor of the tribe, and all ambiguities are to be resolved in its favor." *Jim,* 156 Wn.App. at 41. Since it is not plain what the Legislature intended by these terms, they should be construed broadly consistent with federal Indian law principles.

Because it is clear that Congress intended that the TFAS be owned by the United States for exclusive benefit and use of tribal members, for purposes of RCW 37.12.010 the sites are certainly held in "trust" as all of the necessary elements of an Indian trust are present. Pub. L. No. 100-581, § 401. The Treaty Fishing Access Site legislation establishes the trustee (the United States), the beneficiaries (the four Columbia River treaty tribes), and the trust corpus (Indian treaty fishing sites, i.e., "trust property"). See *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). This principle has been expressed as:

> Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorization or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. Therefore, even though the 1988 Act does not mention the word "trust," its elements are created nonetheless. Moreover, alienation is certainly "restricted" because the tribes only have a beneficial use.

In addition, when the "established reservation" is a federally controlled fishing site where only Indians are permitted access under federal statute and regulations, any state criminal jurisdiction over Indian activity would be an unwarranted intrusion upon federal and tribal authority. See *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 337, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (state jurisdiction on Indian reservation preempted if it "interferes or is incompatible with federal and tribal interests"). If the purpose of the statute is to affirm the ability of tribes to govern themselves on their own lands within reservations established by Congress, then the Legislature's intent should be construed liberally to include the TFAS as "tribal lands held in trust." *Yakima Indian Nation,* 439 U.S. at 502 (State's interest in "partial" jurisdiction is providing protection to non-Indians on reservation while allowing for tribal self-government on trust or restricted lands).

Although the State argues that *State v. Boyd* conflicts with the court's ruling below, that case is factually distinguishable (aside from its lack of binding authority on this Court). Despite being within the boundaries of the Colville Reservation, the federal parcel at issue in *Boyd*

was owned by the U.S. Bureau of Reclamation (BOR) and was intended to "accomplish the purposes of the Grand Coulee Dam project." *Boyd,* 109 Wn.App. at 253. After the land was condemned by the government for the dam's operation there was never any action by Congress to allow the Colville Tribe to use the site for its own exclusive purposes guaranteed by treaty. *Id.* It is therefore clear that *Boyd* does not control.

Moreover, this Court's decision in *Cooper* indicates that any assertions of state jurisdiction after 1968 require the approval of affected tribes.[4] The Indian Civil Rights Act (ICRA), enacted that year, requires tribal consent by majority vote for "all future assumptions of state jurisdiction over Indian country." *Cooper,* 130 Wn.2d at 774; 25 U.S.C. §§ 1321(a), 1326. One of the issues in *Cooper* was whether the establishment of the Nooksack Reservation vitiated the State's preexisting assumption of criminal jurisdiction over Indian lands outside the reservation, including the trust allotment that was the *situs* of the crime. In concluding that it did not, the Court assumed that any Indian country established after 1968 was subject to ICRA's tribal consent requirement.[5]

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[4] The issue of tribal consent under ICRA was not raised by the parties in the court below. However, parties may raise claimed errors regarding lack of trial court jurisdiction for the first time in any appellate court. RAP 2.5(a).

[5] The Court in *Cooper* did not decide the issue of whether the establishment of the Nooksack Reservation vitiated pre-existing state jurisdiction on lands included *within* such reservation. *Cooper,* 130 Wn.2d at 781 n. 6.

Like the Nooksack Reservation in *Cooper,* the Maryhill TFAS was established by Congress after the effective date of ICRA. Pub. L. No. 100-581, § 401(a), 102 Stat. at 2944 (1988). As noted *supra,* the State is conceding that the Maryhill TFAS is "Indian country." Neither the Yakama Nation nor any of the other tribes who have exclusive use of the site have consented to the criminal jurisdiction of the State under RCW 37.12.010. Indeed, the Yakama tribal government opposed enactment of RCW 37.12.010 all the way to the highest court in the United States.[6] As a result, any assertion of State criminal jurisdiction against Yakama enrolled members at the TFAS is precluded by federal statute unless and until a majority of such members vote their approval. 25 U.S.C. § 1326. The decision of the court below is therefore entirely consistent with *Cooper,* and should be affirmed.

B. THE COURT SHOULD NOT OVERRULE *STATE V. SOHAPPY* BECAUSE IT IS CORRECT AND CAUSES NO HARM TO THE STATE OR TRIBES, BUT IF THE COURT CHOOSES TO DO SO, THE DECISION OF THE COURT BELOW SHOULD STILL BE AFFIRMED.

1. The State has not made the required showing that *Sohappy* is incorrect and harmful in order for the Court to overrule.

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[6] A brief history of the Yakama Nation's opposition to both P.L. 280 and RCW Chapter 37.12 is contained in *Public Law 280: the Status of State Legal Jurisdiction Over Indians After* Washington v. Confederated Tribes and Bands of the Yakima Indian Nation, 15 Gonzaga Law Rev. 133, 149-161 (1980).

The State is asking the Court to take an extraordinary step by overruling its own judicial precedent as established in *State v. Sohappy,* which was decided less than four months before Congress authorized the TFAS in 1988. The Court has recently had occasion to closely examine the standard for overruling a prior decision, which requires "a clear showing" that it is both incorrect and harmful. *State v. Barber,* --- Wn.2d ---, --- P.3d ---, 2011 WL 172088. In overruling its decision in *State v. Miller,* the Court held that *Miller* was incorrect because it had misread precedent in two previous cases and was inconsistent with a third. *Id.* at 8-10. The Court also articulated two specific reasons why the decision was "harmful" – it undermined the purposes of the 1981 Sentencing Reform Act and risked violating the separation of powers doctrine. *Id.* at 10-11.

Unlike *Barber,* the State in this case has failed to make a clear showing of error and harm. First, the ruling in *Sohappy* is not incorrect. Because the Legislature never defined the terms "established Indian reservation" or "held in trust" in RCW 37.12.010, state courts must necessarily look to federal law, which is exactly what the Court did in *State v. Sohappy.* Cooks Landing, the in-lieu fishing site at issue in *Sohappy,* was carved out of the public domain for exclusive Indian use eighteen years before enactment of the "partial" jurisdictional statute codified at RCW 37.12.010. Pub. L. No. 79-14, § 2, 59 Stat. 22.

Moreover, because it has been controlled, operated and regulated exclusively by the BIA at the direction of Congress for over sixty years, the site should be considered as being "held in trust by the United States" for the exclusive benefit of the Columbia River treaty tribes despite any formal designation as such. 25 CFR Part 248. The Court noted this fact in its decision. *State v. Sohappy,* 110 Wn.2d at 910. Although the State criticizes *Sohappy* for relying on a federal case declaring that the site is "Indian country," the inquiry is directly on point because the case also analyzed what constitutes an "Indian reservation" under federal Indian law principles. *Id.* (citing *U.S. v. Sohappy,* 770 F.2d at 882).

Nevertheless, the State asserts that "the errors contained within the *Sohappy* analysis are harmful in that they continue to cause confusion by courts and litigants." Petition for Review at 19. The State has offered absolutely no evidence to support this factual allegation, and cites no cases. In reality, the Court's overruling of *Sohappy* would upset over twenty years of reliance by tribal law enforcement on the understanding that Cooks Landing is governed exclusively by federal and tribal laws.

In addition, the State contends that failure to overrule either *Sohappy* or the decision below will be harmful because "non-federal or non-major crimes occurring at TFASs such as Indian assaults against Indians and property crimes would not be subject to state jurisdiction,

tribal jurisdiction, or federal jurisdiction." Petition for Review at 16. However, this Court has recognized that Indian tribes "retain concurrent jurisdiction over all crimes committed by Indians in Indian country." *State v. Eriksen,* --- Wn.2d ---, 241 P.3d 399, 404 (2010). Under BIA rules governing the TFAS, tribal members are subject to laws of the Indian tribes in which they are enrolled as well as federal laws and regulations. 25 CFR § 247.5(a). Because the fishing sites are within "Indian country," Indians using them are subject to federal prosecution under the Indian General Crimes Act (IGCA) and the Major Crimes Act. 18 U.S.C. §§ 1152, 1153; see also *United States v. Bruce,* 394 F.3d 1215, 1219 (9th Cir. 2005). Indians may be charged under the Lacey Act for crimes involving fish and wildlife. 16 U.S.C. § 3372(a)(1); *U.S. v. Sohappy,* 770 F.2d at 822. They are also subject to federal criminal laws of general applicability unless there is a treaty exemption. *Bruce,* 394 F.3d at 1220.

The exception in the IGCA for crimes committed by Indians against other Indians, noted by the State in its Petition for Review, has been interpreted as "manifesting a broad congressional respect for tribal sovereignty in matters affecting only Indians." *Id.* at 1219. The State's assertion that the tribes have "limited jurisdiction" over criminal activities of their own members or other Indians completely ignores the principle that tribes have substantial authority within Indian country. *Id.* The

State's prediction of a calamitous jurisdictional vacuum resulting from the Court of Appeals decision therefore has no merit.

Moreover, since the *Sohappy* decision the Legislature has had full opportunity over two decades to amend the statutory language to clarify its meaning in relation to both in-lieu and treaty fishing access sites, but has declined. The Legislature is "presumed to be aware of judicial interpretation of its enactments," and if it really wanted State criminal jurisdiction to apply to TFAS, it would have expressly said so in subsequent amendments to RCW 37.12.010. *Friends of Snoqualmie Valley v. King County Boundary Review Bd.,* 118 Wn.2d 488, 496-497, 825 P.2d 300 (1992). The contention by the State that *Sohappy* conflicts with legislative intent is therefore not persuasive and must be rejected.

2. In the event the Court were to take the extraordinary step of overruling its holding in *State v. Sohappy,* the decision below should still be affirmed because treaty fishing is exempted from State criminal jurisdiction under RCW 37.12.060.[7]

Even if the Court believes that *State v. Sohappy* was wrongly decided, there is an additional ground on which the Court should sustain the Court of Appeals ruling in this case. The defendant in *Sohappy* was convicted of assault on non-Indian law enforcement officers and was not

[7] This issue was briefed by the parties in the court below, but the court did not decide it. *Jim,* 156 Wn.2d at 43-44. However, if the Court of Appeals "did not consider all of the issues raised by a party which might support that decision, the Court may either consider and decide those issues or remand the case to the court below to decide them." RAP 13.7(b); see *State v. Michielli,* 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

cited for fishing violations, a fact that distinguishes the case before the Court. Congress has not authorized the State to assume any criminal jurisdiction over exercise of Indian treaty fishing rights anywhere. Both RCW Chapter 37.12 and its congressional authorization provide that nothing in the statute "shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." RCW 37.12.060; 18 U.S.C. § 1162(b). Wholly aside from the question of whether the Maryhill TFAS is an "established Indian reservation," the State simply cannot by its own statute assume criminal jurisdiction anywhere in Indian country in order to enforce state fishing laws against enrolled Yakama members exercising treaty fishing rights. The reference to regulation of treaty fishing in both 18 U.S.C. § 1162(b) and RCW 37.12.060 should be interpreted to mean that the Yakama Nation's exclusive right to regulate fishing by its own enrolled members within Indian country is not abrogated or diminished by enactment of RCW 37.12.010.

This is because any abrogation or diminishment of Indian treaty rights can only be achieved by Congress, and must be expressed clearly and explicitly. *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). By this principle

Congress did not intend the statute to have any effect on Indian treaty fishing hunting, or the regulation thereof. *Id.* at 411; 18 U.S.C. § 1162(b). However, this does not mean that RCW 37.12.060 simply preserves federal case law regarding State regulation of Indian treaty fishing. Virtually all of the judicial decisions regarding the State's authority to regulate Columbia River Indian treaty fishing have been decided in the context of fishing activities at "usual and accustomed places" outside of Indian country. See, e.g., *Sohappy v. Smith,* 302 F.Supp. 899 (D.Or. 1969); *State v. James,* 72 Wn.2d 746, 435 P.2d 521 (1967). Conversely, under RCW 37.12.010 the State has assumed jurisdiction to enforce its criminal laws over large areas *within* Indian country. *State v. Cayenne,* 165 Wn.2d 10, 14, 195 P.3d 521 (2008).

However, federal courts have persuasively held that the savings provision in P.L. 280 prohibits state regulation of fishing within Indian reservations. See *Quechan Tribe of Indians v. Rowe,* 350 F.Supp. 106, 109 (S.D.Cal. 1972); *State v. Clark,* 282 N.W.2d 902 (Minn. 1979), *cert. denied,* 445 U.S. 904 (1980). The U.S. Supreme Court has also held that the same clause prohibits state regulation of treaty fishing within Indian country outside of any established reservation. *Menominee Tribe,* 391 U.S. at 411. The Yakama Nation has criminal jurisdiction over its enrolled members wherever they may be conducting treaty fishing

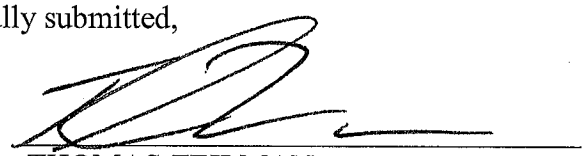
activity. *Settler v. Lameer,* 507 F.2d 231, 237 (9th Cir. 1974). Washington has never previously assumed any jurisdiction over Indian treaty fishing within Indian country. See, e.g., *Tulee v. Washington,* 315 U.S. 681, 683, 62 S.Ct. 682, 86 L.Ed 1115 (1942) ("The state does not claim power to regulate fishing by the Indians in their own reservations"). The very fact that treaty fishing was singled out for exclusion by the federal statute is a legislative acknowledgement of the special role that Indian treaties play in exercise of tribal sovereignty. As a result, State enforcement against treaty fishing within any TFAS is preempted by federal law.

V. CONCLUSION

This Court should affirm the decision of the Court of Appeals in this case, and decline to overrule *State v. Sohappy,* for the reasons indicated in Part IV.

DATED this 1st day of February, 2011.

Respectfully submitted,



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